No. 83-1398

In the Supreme Court of the United States

OCTOBER TERM, 1983

GEORGE CROCKETT, JR., ETC., ET AL., PETITIONERS

v.

RONALD WILSON REAGAN, PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1398

GEORGE CROCKETT, JR., ETC., ET AL., PETITIONERS

v.

RONALD WILSON REAGAN, PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners, who are Members of Congress, challenge the legality of United States military assistance to El Salvador.

1. The War Powers Resolution (WPR), 50 U.S.C. 1541 *et seq.*, provides that if, "[i]n the absence of a declaration of war, * * * United States Armed Forces are introduced * * * into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances" (50 U.S.C. 1543(a)(1)), the President shall submit a written report to the Speaker of the House and the President pro tempore of the Senate.[1] The Foreign Assistance Act of 1961

[1]This report is to provide the following information (50 U.S.C. 1543(a)):

> (3)(A) the circumstances necessitating the introduction of United States Armed Forces;

(FAA), 22 U.S.C. 2151 *et seq.*, generally prohibits the provision of security assistance "to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights" unless the President certifies that "extraordinary circumstances exist warranting provision of such assistance" (22 U.S.C. 2304(a)(2)). Since 1979, the United States, at the request of the government of El Salvador, has deployed military training teams in that country and has provided it with financial assistance for economic, military, and security purposes. The President has not submitted the report described in the WPR or the certification mentioned in the FAA in connection with these activities.

2. Petitioners brought this suit against the President, the Secretary of State, and the Secretary of Defense in the United States District Court for the District of Columbia. Petitioners contended that American forces in El Salvador were in a situation "where imminent involvement in hostilities is clearly indicated" and that El Salvador had engaged in consistent violations of human rights. They accordingly claimed that the President had violated the WPR and the FAA.[2] Petitioners sought, among other things, "a writ of

---

(B) the constitutional and legislative authority under which such introduction took place; and

(C) the estimated scope and duration of the hostilities or involvement.

[2]Petitioners have also suggested that by sending Armed Forces personnel to El Salvador, the President violated the War Powers Clause of the Constitution, Article I, Section 8, Clause 11, which provides that Congress has the power to declare war. But petitioners have not distinguished this claim from their claim under the WPR (see, *e.g.*, Pet.28) nor have they asserted that the War Powers Clause gives them any rights other than those they have under the WPR. See 50 U.S.C. 1547(d)(1): "Nothing in [the WPR] * * * is intended to alter the constitutional authority of the Congress or of the President * * *."

In any event, the War Powers Clause grants power to Congress as an institution, not to individual Members of Congress. Petitioners —

mandamus and/or an injunction directing that [the government] immediately withdraw all United States Armed Forces, weapons, and military equipment and aid from El Salvador and prohibiting any further aid of any nature" (Pet. App. A11).

The district court dismissed the complaint (Pet. App. A6-A46; 558 F. Supp. 893). The court noted that the government took the position "that the factual circumstances in El Salvador do not trigger the WPR" (Pet. App. A14). Thus, the court stated, "the question presented * * * require[s] judicial inquiry into sensitive military matters" (*id.* at A23). The district court remarked that it "lacks the resources and expertise (which are accessible to the Congress) to resolve disputed questions of fact concerning the military situation in El Salvador" (*ibid.*). The district court accordingly concluded that the claim under the WPR should be dismissed because it was not appropriate for judicial resolution (*id.* at A20-A21):

> The Court concludes that the factfinding that would be necessary to determine whether U.S. forces have been introduced into hostilities or imminent hostilities in El Salvador renders this case in its current posture non-justiciable. The questions as to the nature and extent of the United States' presence in El Salvador and whether a report under the WPR is mandated because our forces have been subject to hostile fire or

---

individual Members who make no claim that Congress has authorized this suit — accordingly cannot sue to enforce the Clause. Congress as an institution has asserted its prerogatives under the Clause by enacting the WPR; that was the purpose of the Resolution. Since, as we demonstrate in text, the Resolution did not authorize or contemplate litigation such as this, petitioners cannot portray this case as an effort to protect Congress's institutional authority under the Clause.

> are taking part in the war effort are appropriate for congressional, not judicial, investigation and determination.

The district court explicitly noted that it did not "reach the other asserted bases for dismissal, which include standing, equitable discretion and lack of a private right of action" (*id.* at A39).

The district court then held that petitioners' claims under the FAA should be dismissed in the exercise of the court's "equitable discretion" (Pet. App. A41). The district court explained its ruling as follows (*id.* at A42-A44):

> [Petitioners'] concern that aid is being given to a country which is engaging in a consistent pattern of gross violations of human rights has been directly addressed by Congress. In Section 728 of the International Security and Development Cooperation Act of 1981 [Pub. L. No. 97-113, 95 Stat. 1519], assistance to El Salvador was conditioned upon certification by the President, 30 days after enactment and every 180 days thereafter, that the government of El Salvador is making a concerted and significant effort to comply with internationally recognized human rights * * *. Since its enactment, the President has made two certifications under the Act. Congress has taken no action to end aid to El Salvador under the Foreign Assistance Act * * * or by other means. Plaintiffs have asked the court to examine independently the President's certifications of the progress of El Salvador's government in the human rights field * * *. Whatever infirmities the President's certifications may or may not suffer, it is clear that under these circumstances [petitioners'] dispute is primarily with their fellow legislators who have authorized aid to El Salvador while specifically addressing the human rights issues, and who have accepted the President's certifications.

The court of appeals affirmed (Pet. App. A1-A5; 720 F.2d 1355) "for the reasons stated by the District Court" (Pet. App. A4). Judge Bork concurred on the ground that petitioners lacked standing. He reasoned that "an alleged diminution in congressional influence must amount to a disenfranchisement — a nullification or diminution of a congressman's vote — before a congressional plaintiff may claim the requisite injury-in-fact necessary to confer standing to sue" (*id.* at A5).

3. Petitioners' complaint was correctly dismissed, essentially for the reasons stated by the courts below. Moreover, it is clear that Congress did not intend either the WPR or the FAA to be enforced by litigation. Neither statute contains language suggesting that lawsuits by citizens or Members of Congress could be brought to enforce its provisions; petitioners have not identified anything in the legislative history of either statute suggesting that this is an appropriate means of enforcement; and there are many reasons to believe that Congress did not intend the courts to become involved in the sensitive issues between the executive and legislative branches that these statutes address.

a. Congress enacted the WPR to "insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities" (50 U.S.C. 1541(a)). Petitioners identify nothing in the language or legislative history of the WPR suggesting that Congress intended to enlist the judiciary in this effort. Indeed, passages from the legislative history cited by petitioners themselves suggest that Congress did not foresee judicial intervention but relied on the President to interpret the WPR and act according to its provisions. For example, Senator Javits, a leading proponent of the WPR, noted that crucial provisions of the Resolution " 'assume[] that the President will act according to law. No other assumption is possible unless we are to discard our

whole constitutional system.' " 119 Cong. Rec. 1401 (1973) (quoted at Pet. 37-38). And Senator Javits added (119 Cong. Rec. 1401 (1973)): "[W]hen the President's authority is so defined, as it will be if this War Powers bill becomes law, then the issue of authority is determined in an authoritative way, and, I have little doubt, will be carried out to the best of his ability in good faith by any American President."

In addition, as the district court ruled in this case, and as this Court has long recognized in comparable settings, the questions that a court would have to decide in order to adjudicate a claim under the WPR are wholly unfit for judicial resolution. As this Court stated in a well-known passage (*Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948)):

> The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. * * * But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

See also *Goldwater* v. *Carter*, 444 U.S. 996, 1003-1004 (1979) (Rehnquist, J., concurring); *Coleman* v. *Miller*, 307 U.S. 433, 455 (1939); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936); *Holtzman* v. *Schlesinger*, 484 F.2d 1307, 1309-1312 (2d Cir. 1973), cert. denied, 416 U.S. 936 (1974); *Atlee* v. *Laird*, 347 F. Supp. 689, 705 (E.D. Pa. 1972) (three-judge court), aff'd, 411 U.S. 911 (1973).

When Congress enacted the WPR, it was well aware that it was engaging in an act of considerable constitutional delicacy.[3] At the same time, Congress must have been aware of both the existence and the validity of the persistent judicial attitude that courts should not intercede to decide sensitive foreign policy questions. If Congress had intended courts to engage in the task of determining whether American servicemen are in a "situation[] where imminent involvement in hostilities is clearly indicated by the circumstances" (50 U.S.C. 1543(a)(1)), it is certain that Congress would have said so explicitly.

b. There is similarly no indication in the language or legislative history of the FAA that Congress intended the courts to become involved in its enforcement.[4] The question whether a foreign government has "engage[d] in a consistent pattern of gross violations of internationally recognized

---

[3]For example, the first section of the Resolution carefully identifies its constitutional bases (see 50 U.S.C. 1541), and the penultimate section states that nothing in the Resolution "is intended to alter the constitutional authority of the Congress or of the President" (50 U.S.C. 1547(d)(1)).

[4]The human rights legislation pertaining specifically to El Salvador on which the district court relied (see Pet. App. A42-A44, quoted at page 4, *supra*) subsequently expired, as petitioners note (Pet. 15). But on November 14, 1983, Congress specifically authorized a continuation of military aid to El Salvador. Pub. L. No. 98-151, § 532, 97 Stat. 970. The district court's reasoning therefore remains valid.

human rights" (22 U.S.C. 2304(a)(2)) would require a court to make a factual inquiry of a kind to which courts are wholly unaccustomed and for which they are ill-equipped. Beyond that, for a court to order aid to that government terminated on the basis of such a finding would obviously have the greatest potential to embarrass the United States in the conduct of its foreign affairs. See *Baker* v. *Carr*, 369 U.S. 186, 217 (1962) (courts will refrain from deciding questions where doing so will create "the potentiality of embarrassment from multifarious pronouncements by various departments on one question"). If Congress intended to give courts this extraordinary role, it would surely have said so explicitly.

In addition, many other federal statutes resemble the provisions of the FAA that petitioners invoke in that they place restrictions on the authority of the executive branch to spend appropriated funds. To allow such restrictions routinely to be enforced by suits brought by Members of Congress would substantially reorder relations between Congress and the executive branch, and petitioners suggest no reason for this Court to bring about such a reordering. Indeed, petitioners appear to acknowledge that their only interest in this litigation is in ensuring that the executive branch follows the will of Congress (see, *e.g.*, Pet. 45-46), and as Judge Bork concluded, that interest is not sufficient to give petitioners standing. "This Court repeatedly has rejected claims of standing predicated on ' "the right, possessed by every citizen, to require that the Government be administered according to law. . . ." *Fairchild* v. *Hughes*, 258 U.S. 126, 129 [1922].' " *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 482-483 (1982), (quoting *Baker*, 369 U.S. at 208). See also *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974); *United States* v. *Richardson*, 418 U.S. 166 (1974); *Laird* v. *Tatum*, 408 U.S.

1 (1972); *Ex parte Levitt*, 302 U.S. 633 (1937). We know of no principle that Members of Congress have any greater right than ordinary citizens to bring a lawsuit based on only "the generalized interest * * * in constitutional governance" (*Schlesinger*, 418 U.S. at 217) or governance according to law. See, *e.g.*, *Harrington* v. *Bush*, 553 F.2d 190 (D.C. Cir. 1977); *Harrington* v. *Schlesinger*, 528 F.2d 455 (4th Cir. 1975); *McClure* v. *Carter*, 513 F. Supp. 265, 269-270 (D. Idaho) (three-judge court), aff'd, 454 U.S. 1025 (1981).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MAY 1984

DOJ-1984-05